Google Inc. et al v. Egger et al Doc. 333 Att. 17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS,
TINA M. FOSTER, GITANJALI S. GUTIERREZ,
SEEMA AHMAD, MARIA LAHOOD,
RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH,
President of the United States;
NATIONAL SECURITY AGENCY,
LTG Keith B. Alexander, Director;
DEFENSE INTELLIGENCE AGENCY,
LTG Michael D. Maples, Director;
CENTRAL INTELLIGENCE AGENCY,
Michael V. Hayden, Director;
DEPARTMENT OF HOMELAND SECURITY,
Michael Chertoff, Secretary;
FEDERAL BUREAU OF INVESTIGATION,
Robert S. Mueller III, Director;
JOHN D. NEGROPONTE,
Director of National Intelligence,

Defendants.

Case No. 06-cv-313

Judge Gerard E. Lynch
Magistrate Judge Kevin N. Fox

BRIEF OF AMICI PROFESSORS OF ETHICS AND LAWYERS PRACTICING IN THE PROFESSIONAL RESPONSIBILITY FIELD

Introduction

We understand that lawyers at the Center for Constitutional Rights and affiliated lawyers represent a number of foreign nationals detained at Guantanamo and considered "enemy combatants" by the United States government. They also represent their next friends, primarily family members of the detainees residing in foreign countries, in the habeas litigation on behalf of the detainees. In the course of litigating these cases, these lawyers must communicate with

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these clients and with other persons residing in foreign countries, including foreign witnesses, experts and human rights advocates.

The NSA program of electronic eavesdropping raises serious ethical issues for these lawyers, who have both an ethical obligation to communicate with their clients and other individuals concerning these cases and an ethical obligation to ensure the confidentiality of those communications. The criteria announced by government officials for targets of the NSA eavesdropping program are so open-ended that they would include many, if not all, of those clients, family members and others these lawyers must contact.

This amicus brief is offered by a group of ethics law professors and practitioners in the field to provide a discussion of the impact of this surveillance on the professional responsibility obligations of these lawyers and how that impact should inform the Court's determination of whether these lawyers have standing to assert the claims brought in this proceeding.

A. The Fiduciary Obligation to Assure Confidentiality

Lawyers are fiduciaries of their clients. Lawyers' fiduciary obligations to their clients were originally recognized in the common law, and now they are codified in the rules of professional ethics. One of these fiduciary obligations requires lawyers to protect the confidentiality of their clients' information. This fiduciary obligation is recognized in three distinct doctrines of law: the lawyer's ethical duty of confidentiality; the evidentiary privilege for attorney-client communications; and the evidentiary privilege for attorney work-product. Analysis of these three doctrines demonstrates that the law has been robust in protecting the confidentiality of client information.

1. The Duty of Confidentiality

The first aspect of the lawyer's fiduciary obligation is the duty to ensure the confidentiality of information learned in the course of a representation.[1] The confidentiality obligation is two-fold, consisting of both a prohibition and an affirmative duty. First, it prohibits the lawyer from disclosing confidential information about the client without client consent. The lawyer must not engage in casual or frivolous conversation about a client's matters that creates an unreasonable risk of harm to the interests of the client. Restatement (Third) of the Law Governing Lawyers § 60 (2000).

Second, the confidentiality obligation imposes on lawyers an affirmative duty to take steps to ensure the secrecy of client information. When communicating with clients or in pursuit of a client case, the lawyer must ensure that the communication is private, whether the communication is in person, on paper or electronic. No client matters are discussed in public locations, such as elevators or courthouse corridors, where they can be overheard. "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Model Rules of Prof'l Conduct R. 1.6, cmt. 16 (2005).

Client information must be kept away from prying eyes and ears. Client files must be kept secure. Lawyers must instruct and supervise their employees to preserve confidentiality. A lawyer must take reasonable steps so that law-office personnel properly handle confidential client information with care. Restatement (Third) of the Law Governing Lawyers § 60 (2000). In responding to a discovery request, for example, a lawyer must exercise reasonable care so that confidential client information not subject to the request is not inadvertently disclosed. Restatement (Third) of the Law Governing Lawyers § 60 (2000).

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[1] New York's rules of professional conduct require a lawyer to protect "information gained in the professional relationship." DR 4-101; 22 NYCRR section 1200.19. DR 4-101 "is probably the most important single rule in the Code. It embodies the basic duty of confidentiality that is fundamental to the understanding of loyalty, conflicts of interest and the adversary system." Roy D. Simon, *New York Code of Professional Responsibility Annotated* (2006 Edition), at 480. The duty of confidentiality in New York is broad and prohibits a lawyer from disclosing information learned in the relationship or information embarrassing or detrimental to the client even if the client has not specifically requested the non-disclosure. Simon, *id.* at 483-486.

The duty of confidentiality – the obligation of lawyers to maintain the sanctity of the lawyer-client relationship at all times – is directly at issue in this case. It is primarily that duty – as well as the duties to protect information subject to the attorney-client and attorney work product privileges discussed below – that requires the lawyer to respond to third party surveillance in the manner described in Part C, *infra*.

2. Attorney Client Privilege

The rules of evidence recognize clients need to consult lawyers in confidence, and those rules provide virtually absolute bar on discovery of confidential lawyer-client communications that are for purpose of seeking or providing legal advice. To ensure that such communications will be covered by the privilege, the lawyer must make sure that only the lawyer and the client are privy to the communication. The attendance of a client's accountant at a meeting between the lawyer and client can destroy the privilege. If a client's son attends a meeting the same result is likely to obtain. *See, e.g.*, Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D.Ill. 1981); Schwartz v. Wenger, 124 N.W.2d 489 (Minn. 1963) (testimony of nonsurreptitious eavesdropper who overheard client-lawyer conversation in crowded courthouse hallway admissible because no effort made by client or lawyer to ensure secrecy).

Similarly, written communications are treated with special care. All confidential client information must be acquired, stored, retrieved, and transmitted under systems that are reasonably designed and managed to maintain confidentiality, and therefore it is up to lawyers to take necessary affirmative steps to put those systems in place.

Restatement (Third) of the Law Governing Lawyers § 60 (2000). *See* In re Victor, 422 F. Supp. 475, 476 (S.D.N.Y. 1976) (finding no privilege for documents placed in a public hallway since "it certainly could not be said that the client expected these papers to be kept from the eyes of third parties"). Lawyers are also obliged to label written communications with an appropriate description. Copies are not sent to anyone whose knowledge of the information would waive the privilege, and envelopes are sealed and legended as well to maintain the confidentiality of the privileged communication.

Electronic communications also must be protected to maintain the privilege. Telephone conversations are not conducted in public places or with individuals on the line who could break the privilege. Faxes are sent with appropriate identification of their privileged content. And bar associations have spent endless hours debating (and largely resolving) to what extent lawyers may employ e-mail and cell phones when communicating with clients consistent with maintaining the privilege. *See, e.g.*, LA County Bar A'ssn Professional Responsibility and Ethics Committee Opinion # 514 (2005); Opinion 96-1 (1997); 97-1 (1997), Iowa Supreme Court Board of Professional Ethics and Conduct (e-mail encryption); North Carolina State Bar Ethics Opinion No. RPC 215 (e-mail encryption); Vermont Bar A'ssn, Advisory Ethics Opinion 97-5 (1997) (encryption of e-mail not required). Delaware Bar A'ssn Committee on Professional Ethics, Opinion 2001-2 (e-mail and cell phone communication acceptable).

Finally, lawyers are bound to resist – to the greatest extent legally permissible – the attempts by others to access privileged information. Lawyers are required to refuse to testify, to argue that their refusal is consistent with the privilege and, if the lawyer is subject to an adverse decision on the issue, to seek if at all possible appellate review, including suffering a possible contempt citation to force a further adjudication of the privilege claim. *See* Model Rules of Prof'l Conduct R. 1.6, cmt. 13 (2005); State v. Schubert, 235 N.J. Super. 212 (App. Div. 1989).

3. The Attorney Work Product Privilege

Evidence law also protects the confidentiality of client information through the attorney work product privilege. This doctrine applies to all work undertaken by or at the direction and control of the lawyer either in anticipation of or in actual litigation, as these lawyers here are so engaged. This privilege prevents inquiry into any activities – research, interviews with witnesses and others, conversations, reviews of documents, consultations with expert witnesses and consultants, and a myriad of other tasks – lawyers are required to undertake to provide competent legal service. *See* Fed. R. Civ. P. 26(b)(3). The work product privilege is intended to preserve a zone of privacy in which a lawyer or other representatives of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from intrusion by their adversaries. Hickman v. Taylor, 329 U.S. 495, 510-511 (1947).

But the privilege is only available, and the ability to prevent the review of the lawyer's work product will only succeed, if, again, the lawyer takes the precautions to ensure the confidentiality of the work product. The lawyer must be diligent that the work product privilege is not waived. This requires the lawyer to conduct these activities in a careful manner. No one participates who is not essential to the task. All who participate are required to maintain confidentiality. All documents are not only provided with the proper legend, but also distributed only to the absolute minimum number of people who need to know. And, again, if attempts are made to discover or inquire into work product protected information, the lawyer is obliged to resist the requests or demands and test in court, even to the point of appellate review, the correctness of the work product designation.

B. The Public Policy Foundation

Why do the legal profession and courts go to such great lengths to maintain confidentiality and the privileges? Because courts have determined that "'full and frank communication between attorneys and their clients . . . promote[s the] broader public interests in the observance of law and the administration of justice.'" Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). We must encourage our clients to trust us and share their innermost secrets with us. Otherwise we can neither represent our clients effectively nor fulfill our obligation to urge our clients to conform their conduct of the law. If we do not know what our clients did or what they plan to do, we cannot provide them with the legal advice they require. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); ("[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976) ("[t]he purpose of the privilege is to encourage clients to make full disclosure to their attorneys...it protects only those disclosures, necessary to obtain informed legal advice, which might not have been made absent the privilege"). In re Vanderbilt (Rosner-Hickey), 439 N.E.2d 378, 384 (N.Y.1982) ("[t]he privilege is intended to foster openness between counsel and client so that legal problems can be thoroughly and accurately analyzed"). If clients do not believe that we are the only ones who will be privy to their information, they will not share that information with us.

For this reason, a lawyer who knows that his or her conversations are subject to surveillance, even if the surveillance were by someone other than an adversary, has no choice.

"Given the objectives of the attorney-client privilege, a communication must be made in circumstances reasonably indicating that it will be learned only by the lawyer, client, or another privileged person. The circumstances must indicate that the communicating persons reasonably believed that the communication would be confidential." Restatement (Third) of the Law Governing Lawyers § 71 (2000). A lawyer must take reasonable precautions to prevent confidential client information from coming into the hands of unintended recipients" and "special circumstances...may warrant special precautions." Model Rules of Prof'l Conduct R. 1.6, cmt. 17 (2005).

For example, if a lawyer thinks there might be a listening device in a room, the lawyer should meet with the client elsewhere. If telephone calls are being monitored, the lawyer should not use the telephone. If the lawyer has reason to believe that emails are being reviewed or mail read by persons other than the client, the lawyer must find an alternative confidential means of communication. Even if the client is at some distance, the lawyer must take appropriate precautions and, if necessary, only communicate face-to-face.

What is described here is not simply a best practice, one that is recommended if at all possible. Rather it is an obligation. Lawyers have an uncompromising duty to be competent. Model Rules of Prof'l Conduct R. 1.1 (2005). This includes a duty to gather all necessary information from the client and elsewhere in order to represent the client. *See Id.*, cmt. 5. It also includes a correlative duty to assure the client that the fact-gathering process remains confidential and protected from inadvertent disclosure or waiver. The lawyer must protect not only information gathered but the sources of the information, *i.e.* witnesses the lawyer has interviewed or sources the lawyer has consulted.

Lawyers also have a duty to communicate with their clients. Model Rules of Prof'l Conduct R. 1.4 (2005). Without such communication the lawyer cannot know the client's lawful goals and concerns, nor can the client learn the results of the lawyer's diligent work and the advice the lawyer must provide the client. And, again, the two-way communication process must be kept confidential or the lawyer will be in breach of the duty of confidentiality owed to the client.[2]

C. The Effect of Surveillance Here

It is easy to understand how a threat of surveillance could compromise and undermine the ability to represent the client in a profound way when the lawyer resides near next friends, witnesses and others. Avoiding telephone calls and e-mail exchange would force all communications – not just those with the client – to be carefully planned and scheduled with follow-up communication and spur of the moment inspiration or inquiry giving way to an obligation to engage in the stilted and time-consuming task of rescheduling yet another meeting. Cutting off electronic communication in this scenario does not just place a burden on the lawyer-client relationship and the client's entitlement to be represented by a competent, diligent lawyer, it erodes the relationship in a fundamental way.

This is particularly so given the fact that we live in a world where otherwise instantaneous conversations – with clients not incarcerated, witnesses and other sources – on a whim or a breakthrough are the norm. When lawyers are forced to deviate from that norm, the result is a dramatically unbalanced playing field. An adversary with all the power and resources of the government is free, without any fear of surveillance, to take advantage of every form of modern electronic communication – telephone, facsimile, e-mail and the internet, while the lawyer subject to surveillance must deal with the profound hardships created by pernicious eavesdropping.

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[2] The lawyer is, of course, free to disclose confidential information when so authorized by the client and under narrowly crafted exceptions to the confidentiality rules, none of which are applicable to these circumstances. *See, e.g.*, ABA Model Rule 1.6.

If the situation is virtually impossible when the individuals with whom the lawyer must communicate are geographically close and easily accessible so that the lawyer has the capability to work around the surveillance, it is truly impossible to conjure how much more difficult it would be for a lawyer, required by a real threat of surveillance, to avoid traditional methods in dealing with clients and their next friends, potential witnesses and other sources of information who reside across the seas. Just the act of making appointments, if subject to surveillance, invades the attorney-work product privilege, reveals confidential information and perhaps, in and of itself, discloses attorney-client privileged information as well. A fortiari, no substantive conversation can take place if it is possibly subject to surveillance.

Yet our ethics rules teach lawyers that the lawyer should operate in this manner if the lawyer's duty to maintain the privilege and protect confidentiality is to be fulfilled. The burden this places on the lawyer-client relationship is without precedent and in effect destroys the relationship entirely. Government surveillance of electronic communications of lawyers who are close to their clients and witnesses would impose a significant burden and inconvenience on them. But surveillance of electronic communications of these lawyers is effectively a bar on effective representation. They cannot do their job and their clients cannot have effective representation when 6,000 miles, huge expense and two or more airplane flights, a train and a taxicab ride, separate the lawyer from his or her clients and others who must be contacted. Simply posing the required follow-up question becomes an expensive multi-week ordeal. The required interviews require potentially confidence-disclosing telephone conversations just to schedule and still more trips to faraway places to conduct. And heaven forefend that the contacted individual – like every other individual in the history of the modern world – forgets to tell the lawyer something and needs to communicate yet again.

Conclusion

The description of what is required would be comic if it did not reflect a tragedy in which the lawyer-client relationship is impossible to initiate, develop, sustain or fulfill by the lawyer's knowledge that if the lawyer proceeds in any different way the lawyer will violate the most fundamental fiduciary duty the law imposes upon him or her. The petition to this Honorable Court, it can then be seen, is in the highest traditions of an independent bar, calling on this court's inherent power to establish standards for lawyer conduct and to ensure lawyers can meet those standards.

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